United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-2379

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

HARRY F. HART,

Appellant.

On Appeal From The United States District Court
For The Northern District of New York

BRIEF FOR APPELLEE

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Appellee
Post Office and Court House
Albany, New York 12207

Richard K. Hughes
Assistant United States Attorney
Of Counsel

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(6948)

TABLE OF CONTENTS

Table of Authorities

Cases:

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

HARRY F. HART,

Appellant.

On Appeal From The United States District Court
For The Northern District of New York

BRIEF FOR APPELLEE

ARGUMENT

POINT I

NEITHER EQUITY NOR THE UNITED STATES CONSTITUTION REQUIRES A WARNING ON FEDERAL TAX RETURNS OF POTENTIAL CRIMINAL VIOLATIONS.

Although readily conceding that the United States Constitution, as heretofore interpreted by the federal courts, does not mandate warnings of possible criminal penalties for fraudulent returns on the face of the returns, themselves, Appellant argues that in "fundamental fairness" to the taxpayer, federal tax returns should be amended to advise the taxpayer of *all* potential criminal penalties for filing a fraudulent return.

It appears, however, that the Appellant misconstrues the purpose underlying the "perjury language" on the face of the defendant's 1966, 1967, and 1968 tax returns to be a criminal perjury (26 U.S.C. § 7206(1)) warning by the Internal Revenue Service.

The perjury statement, quoted by the Appellant on page four of his Brief, is based upon Title 26, United States Code, Section 6065, entitled, "Verification of returns."

The purpose of this Section, and Section 7206(1), 6061, and 6064 of Title 26, (the successors to Section 3809 of the 1939 Internal Revenue Code), is

> . . .merely to simplify the task of both taxpayer and the Bureau of Internal Revenue by permitting a verified return in certain situations. 12 (Court footnote: The pertinent committee report states as follows: 'Section 4. Verification of Returns. "This section gives the Commissioner authority to eliminate the oath in the case of corporate, fiduciary, partnership, estate, and gift-tax returns, and other returns or statements. The present law eliminates the oath in the case of individual income-tax returns and employment-tax returns. These changes will not only relieve the taxpayers of the burden of notarizing their returns but will expedite the processing by the Bureau of returns which might otherwise have to be sent back for compliance with the oath requirement. Sen.Rep. No.685, 81st Cong., 1st Sess., Part II, § 4 (1949)) . . . . .*Cohen* v. *United States*. 201 F.2d 386, 393 (9th Cir. 1953), *cert. denied*, 345 U.S. 951 (1953).

Appellant suggests a warning on the tax form that a potential felony is committed by a taxpayer who submits an "incorrect" return and that the maximum penalty is $10,000 fine, five years imprisonment, or both, plus the costs of prosecution.

It is clear that several offenses could arise out of the taxpayer's filing *one* fraudulent return. For example, the taxpayer could violate Sections 7201, and 7206 of the Internal Revenue Code, simultaneously, by subscribing a verified, fraudulent return, and by thereafter destroying pertinent incriminating records, in violation of Section 7203 of the Internal Revenue Code. The taxpayer would have thereby committed two felonies, and one

misdemeanor, and subjected himself to a maximum penalty of $25,000 in fines, nine years imprisonment, or both, plus the costs of prosecution.

If the suggested warning had been on the taxpayer's return in the preceding example, would the Government be guilty of misleading the taxpayer and be estopped from prosecuting him under all applicable federal criminal statutes except either Section 7201 or 7206 but not both? Or would Appellant suggest that the forms be amended to advise defrauding taxpayers of *all* potential criminal violations arising out of their misconduct. The latter would undoubtedly result in a tax form so burdensome that the real purpose of the form — the reporting of income, expenses, and tax — would become secondary to the criminal warnings.

It should be emphasized at this point that citizens are presumed to be cognizant of the law and are liable for criminal penalties for breaches of that law. In *United States* v. *Rosenfield*, 469 F.2d 598, 601 (3rd Cir. 1972), which involved a violation of Title 26, United States Code, Section 7203, willful failure to file a return, the Third Circuit approved the District Court's instruction on willfulness which directed, in part,

> . . . .(S)pecific knowledge that this conduct has in fact been made a criminal offense is not necessary to the offense. As long as the inexcusable intent is present, it is not necessary that the defendant know that his conduct is subject to criminal penalties. This is what is meant by the old saying, "Ignorance of the law is no excuse," and it applies in this case.

POINT II

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A TAX FORM OR A CIVIL TAX AUDITOR TO ADVISE A TAXPAYER OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

This Circuit has consistently held that if a taxpayer is aware that he is the subject of a tax investigation, *Miranda* warnings are not required to advise the taxpayer that a civil audit may become a criminal investigation. All taxpayers are presumed to know that such an audit may eventually expose the taxpayer to criminal penalties. *United States* v. *Sclafani*, 265 F.2d 408 (2d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959), cited by the trial court below in its opinion (R.103), and *United States* v. *Caiello*, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970), also cited by the trial court (R.105).

It should be noted that even the minority rule of the Seventh Circuit, as pronounced in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969), which this Circuit specifically declined to follow in *United States* v. *Caiello*, *supra*, at page 472, and which requires *Miranda* warnings to the taxpayer after the investigation of the taxpayer has been referred to the Intelligence Division of the Internal Revenue Service, was fully complied with by Tax Technician David T. Smith (R. 210-211) and Special Agent Joseph A. Duchna of the Intelligence Division (R. 221, 224-227).

Appellant, after conceding that Special Agent Duchna initially advised Mr. Hart of his privilege against self-incrimination, (Appellant's Brief, page eight), would urge this Court to go beyond the *Dickerson* rule already rejected by this Court as not mandated by the Constitution, and henceforth require the civil tax auditor, and the tax form, itself, to advise a taxpayer of his Fifth Amendment privilege against self-incrimination, or the so-called *Miranda* warnings. The tax form and routine auditing procedure would now be burdened with additional matter unrelated to the vast majority of tax returns containing no fraudulent data.

As this Court noted in *United States* v. *Caiello, supra,* at page 473, quoting *United States* v. *Squeri,* 398 F.2d 785, 790 (2d Cir. 1968),

> The Fifth Amendment privilege prohibits the government from *compelling* a person to incriminate himself. It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning. We believe that the presence or absence of compelling pressures, rather than the stage to which the government's investigation has developed, determines whether the *Miranda* requirements apply to any particular instance of questioning.

Applying this interpretation of the Fifth Amendment by the Second Circuit, Special Agent Duchna afforded the defendant *more* protection than the Constitution mandates. If this be the case, the records and statements of the defendant, voluntarily given to the agents of the Internal Revenue Service, were not given or received in contravention of the Constitution and accordingly are not subject to suppression.

Appellant further contends that the Tax Technician was the "agent" of the Special Agent of the Intelligence Division, (Appellant's Brief at page twelve). Admittedly, the Special Agent relies on the findings and expertise of the Tax Technician and coordinates his investigation with the Tax Technician. It would be ludicrous to suggest that the Special Agent should repeat the efforts of the civil Tax Technician.

In the present case, there is no question of any deceit practiced on Mr. Hart by Tax Technician Smith or Special Agent Duchna, as was the case in *United States* v. *Prudden,* 424 F.2d 1021 (5th Cir. 1970). Appellant's suggestion that *all* potential criminal defendants be advised fully at the commencement of a routine civil audit goes far beyond heretofore accepted legal principles, (See: *Prudden, supra,* at page 1033), and might disrupt the routine auditing of tax returns in which no fraud is present by unduly alarming innocent taxpayers.

The Internal Revenue Service News Release IR-897, cited by the Appellant, (Appellant's Brief, at page five), affords a taxpayer whom the Tax Technician suspects of criminal fraud more protection than is constitutionally required. (Cf. *United States* v. *Dickerson, supra.*) At the point a Special Agent is referred an investigation, although "custodial interrogation" is normally absent, a "routine tax audit" may have shifted from investigatorial to accusatorial. There would, therefore, appear to be sufficient basis for warranting this additional precaution voluntarily established by the Internal Revenue Service.

The defendant places great emphasis on his limited formal education. The defendant, however, is a successful self-employed entrepreneur. Mr. Hart daily handles large sums of money, and employs other individuals in his restaurant. As an employer, he is responsible for not only his individual tax liabilities but for withholding income and F.I.C.A. taxes from the earnings of his employees. Lack of formal education in the light of the defendant's business acumen, cannot be equated with naivete and ignorance. As this Court noted in *United States* v. *Caiello, supra,* at page 475,

> Every citizen must know and will be deemed to know that he is under an obligation honestly and fully to furnish correct information regarding his income and to pay the taxes which accordingly would be owing to the government. Every citizen also knows that false returns and fraudulent evasion of taxes are criminal offenses in violation of federal laws. So far as the citizen is concerned his duties and obligations and his liabilities for taxes for violation of law are the same regardless of the duties of the particular agents who may be assigned to investigate his returns, tax liabilities, and possible violations of criminal law.

Finally, Appellant argues that the "subtle" investigative techniques used by Tax Technician Smith and Special Agent Duchna were, because of their friendly overtones, both compelling and deceitful, (Appellant's Brief at pages 5, 10, 13). In *United States* v. *Prudden, supra,* at page 1034, the Fifth Circuit specifically considered and rejected this "friendliness atmosphere" as being inherently coercive and deceitful. That Court stated,

> Prudden argues that the nature of the investigation was concealed because of the friendliness and cordiality of the relationship between himself and the agents. . . .(W)e perceive no possible subterfuge. We can see no reason why civil servants should be required in their daily dealings to assume an uncivil character just because they are in a position to discover criminality on the part of a citizen. That would be a poor form of warning at best. If direct warnings are unnecessary, then requiring circuitous warnings by the manner of action of the agents is irrational. Furthermore, the tone of every interpersonal relationship is subject to the control of all the parties. Prudden's own conduct was a necessary ingredient of the amicable relationship of which he now complains. It may well be that kindness on a taxpayer's part could be calculated to dispel an agent's suspicions or to help to persuade him to see the results of his investigation in the most favorable light. By this we only mean to observe that 'it takes two to tango'.

CONCLUSION

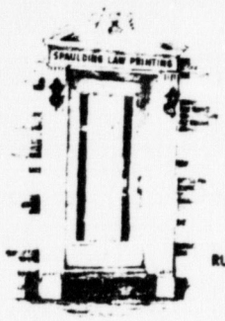
THE RULING OF THE TRIAL COURT IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE DOCUMENTS AND STATEMENTS OF THE DEFENDANT GIVEN TO THE AGENTS OF THE INTERNAL REVENUE SERVICE WAS CORRECT, THE DOCUMENTS AND STATEMENTS WERE PROPERLY RECEIVED INTO EVIDENCE, AND THE JUDGMENT OF CONVICTION OF THE DEFENDANT SHOULD IN ALL RESPECTS BE AFFIRMED.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Appellee
Post Office and Court House
Albany, New York 12207

Richard K. Hughes
Assistant United States Attorney
Of Counsel

74-2379



Records and Briefs for State and Federal Courts

SPAULDING LAW PRINTING CO. ESTABLISHED 1881

313 MONTGOMERY STREET • SYRACUSE, N.Y. 13202 • PHONE AC 315 HA2-4805

RUSSELL D. HAY, owner

AFFIDAVIT OF SERVICE

RE: UNITED STATES OF AMERICA v. HARRY F. HART

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of JAMES M. SULLIVAN, JR., United States Attorney, Attorney for Appellee,

(s)he personally served ~~three (3)~~ two (2) copies of the printed ~~[Record]~~ [Brief] ~~[Appendix]~~ of the above-entitled case addressed to:

JAMES P. SHANAHAN, ESQ.
Attorney at Law
University Bldg.
Syracuse, N. Y. 13202

on December 3, 1974.

~~by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York on~~

Everett J. Rea

Everett J. Rea

Sworn to before me this 3rd
day of December , 1974.

Ruth A. Moloughney
Commissioner of Deeds

AFFILIATED WITH
DAILY RECORD CORP.
ROCHESTER, N. Y.